TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 280.

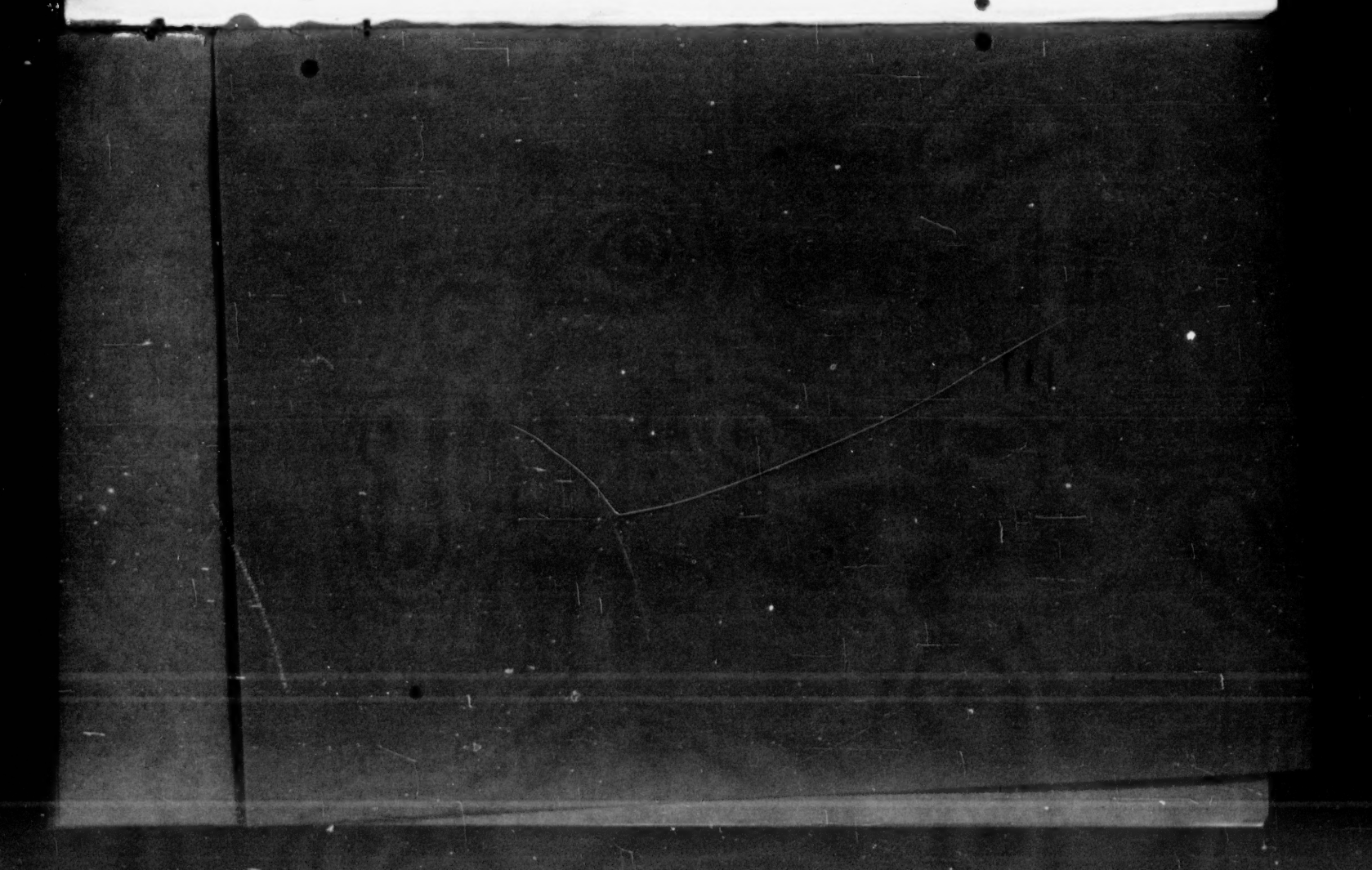
THE UNITED STATES, APPELLANTS,

vs.

JAMES O'KEEFFE.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 4, 1870.



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1 United States Court of Claims.

JAMES O'KEEFFE
vs.
THE UNITED STATES. } Petition.

To the honorable the United States Court of Claims:

The petition of James O'Keeffe, a citizen of Great Britain, and a resident of Savannah, in the State of Georgia, showeth:

That in the month of January, 1865, your petitioner was the owner and in possession of eighteen bales of upland cotton, classed as good quality, weighing about 9,277 pounds, then stored in said city of Savannah.

That in the said month of January, 1865, after the occupation of said city by the United States forces, your petitioner, in obedience to orders from the military authorities of the United States, then holding and governing said city, reported said cotton as his and in his possession; and afterwards, to wit, in the same month of January, all of said cotton was seized and taken possession of by Lt. Col. H. C. Ransom, acting, as your petitioner is informed and believes, under the orders of the War Department, but without the consent of your petitioner and against his will; and that no part of said cotton, or the proceeds thereof was appropriated in any way to the use of the Army or Navy of the United States; but that said cotton was turned over by the officer seizing the same to an agent of the Treasury Department, by whom it was sold and the nett proceeds thereof paid into the Treasury of the United States.

2 Your petitioner avers that he is unable to state the precise amount for which said cotton was sold, or the expenses attending the seizure, shipment, transportation, and sale; but he states on information and belief that the said cotton was sold by the agent of the Treasury Department, for sixty cents per pound, the aggregate of sale being five thousand five hundred and sixty-six dollars and twenty cents, and the expenses did not exceed five per cent., and the nett proceeds thereof which have been paid into the Treasury amount to five thousand two hundred and eighty-seven dollars and ninety cents.

Your petitioner further shows that his cotton had never been abandoned or forfeited, nor become liable to seizure under any of the acts of Congress, in that behalf made and provided; and that it was not liable to seizure or capture, under the laws and usages of war; and that no proceedings for the purpose of condemning said cotton have ever been instituted in any court or before any tribunal.

Your petitioner avers that his property having been taken possession of by the United States Government and appropriated by it, an implied contract has arisen to make your petitioner just compensation therefor, by paying him all said cotton was reasonably worth at the time and place it was so taken from him as aforesaid.

Your petitioner further shows that said cotton was worth, at the time of its seizure, as he verily believes, the sum of $5,566 20, which amount he is entitled to recover from the United States, under the implied contract as above.

Your petitioner further shows, that if there has been a valid and lawful capture of said cotton, which he understands is asserted by the United States, he is nevertheless entitled to receive the nett proceeds of said cotton, amounting to the said sum of $5,287 90, as he verily believes, under the provisions of the act of Congress, approved March 12,

1863, entitled, "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States."

Your petitioner further shows that he has never in any way, voluntarily aided, abetted, or encouraged the late rebellion against the
3 Government and authority of the United States.

COOLEY & CLARKE,
Solicitors for Claimant.

James O'Keeffe, being duly sworn, deposeth and saith, that he is the claimant named in the foregoing petition, and that no assignment or transfer of said claim or any part thereof, or any interest therein has been made; that he is justly entitled to the amount therein claimed from the United States, after allowing all just claims and offsets, and that he believes the facts as stated in said petition are true.

JAMES O'KEEFE.

Sworn to and subscribed before me this fifth day of August, A. D. 1867.

JA'S McPHERSON,
Clerk U. S. Dist. Court, So. Dist. Ga.

P. O. address of claimant, Savannah, Ga.
P. O. address of counsel, Cooley & Clarke, Washington, D. C.

4 In the United States Court of Claims, December term, A. D. 1866.

JAMES O'KEEFE
vs.
THE UNITED STATES. } No. 2907.

And the said defendants by their solicitor, come and make answer to the petition of the claimant herein; and not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of five thousand two hundred & eighty-seven $\frac{90}{100}$ dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

E. P. NORTON,
Solicitor for the United States.

And for a further plea to the said petition the defendants say that the said claimant ought not to have or maintain *has* aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress, approved March 12, 1863, and entitled "An act to provide

for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States."

E. P. NORTON,
Solicitor for the United States.

JAMES O'KEEFE
vs.
THE UNITED STATES. } 2907. Dec. term, 1868.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned & captured property, and for the prevention of frauds in insurrectionary districts within the United States," approved M'ch 12, 1863.

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney General.

5 *Replication.*

United States Court of Claims.

JAMES O'KEEFFE
vs.
THE UNITED STATES. } No. 2907.

1. And now comes the claimant by his solicitors, and for replication to the first plea of the defendant, herein pleaded, says that he denies that the said claimant did not, within two years after the suppression of the rebellion, prefer his claim to the proceeds of the property mentioned and described in said petition in the Court of Claims, as provided by the 3d section of the act of Congress, approved March 12, 1863, entitled "An act to provide for the collection of abandoned property," &c., as alleged in the said defendant's plea. And this, he prays, may be inquired of by the court.

Wherefore the said claimant prays judgment.

COOLEY & CLARKE,
Sol's for Claimant.

Filed Jan'y 13, 1869.

6 3. And for a further replication to the said second plea of the said defendant, herein pleaded, this claimant says that true it is that he was an alien at the time of filing his said petition, as alleged in said plea, but that he was a citizen or subject of the government of the United Kingdom of England, Ireland, and Scotland, and that the said government accords to citizens of the United States the right to pros-

ecute claims against said Government in its own courts. And this he is ready to verify.

Wherefore this claimant denies that he is barred of his said action, and prays judgment.

COOLEY & CLARKE,
Sol's for Claimant.

7 In the Court of Claims.

JAMES O. KEEFE
vs.
THE UNITED STATES. } 2907.

And now, to wit, 6th of Dec., A. D. 1869, the court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said James O. Keefe, claimant, have and recover of and from the United States the sum of one thousand nine hundred and four dollars, seventy cents, ($1,904 70.)

By the court.

A true copy of record.

8 In the Court of Claims, Dec. term, 1869.

JAMES O'KEEFE
vs.
THE UNITED STATES. } 2907.

To the Court of Claims:

The defendants hereby make application for the allowance of an appeal to the Supreme Court of the United States from the judgment rendered in this action on the 6th day of December, 1869, in favor of the claimant for the sum of $1,904 70.

This appeal is prayed on the ground that the judgment in said action affects a large class of cases.

ROB'T S. HALE,
Special Counsel for Treasary Dep't.

Filed in clerk's office, January 24, 1870.

9 At a Court of Claims held at the Capitol, in the city of Washington, 24 January, A. D. 1870.

JAMES O'KEEFE
vs.
THE UNITED STATES. } 2907.

Ordered that the appeal prayed for in the above-entitled case, by the counsel for defendants, be allowed.

By the court.

10 In the Court of Claims.

JAMES O'KEEFFE
vs.
THE UNITED STATES. } No. 2907.

The petitioner claims of the United States the net proceeds of eighteen bales of upland cotton, and the court finds the facts to be:

1. That the claimant is an English subject, and in January, 1865,

resided in the city of Savannah, in the State of Georgia, and owned and had in his possession eighteen bales of upland cotton, stored in a house numbered 148 Broughton street.

2. That the United States took possession of said cotton, by placing a military guard over it, in the house in which it was stored. That subsequently a fire broke out in the cellar in which this and other cotton was stored. That the cotton in the cellar was got out of it, some burned, some wet, some in broken bales, and some in whole bales, and some loose; that it was carried away by the United States and repacked and sold, and the net proceeds thereof paid into the Treasury.

3. That ten bales of said cotton belonged to the claimant.

4. That the government of England accords to its subjects and aliens the right to prosecute claims against it by petition of right given by the common law of England, and regulated by statute 23d and 24th Victoria, July 3, 1860, as to the mode of procedure; in which the petition addressed to the King is by his fiat indorsed thereon, directed to a court of his kingdom to hear and determine the case. The fiat, except in a very extraordinary case, is granted as a matter of right to any suppliant, subject, or alien. The petition is in form addressed to the grace and favor of the King, but in practice is left at the office of the Home Secretary, and the fiat is then obtained as a matter of official routine.

5. That the petitioner had not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the Government.

6. And the court hold that the claimant is entitled to judgment against the United States for the net proceeds of said ten bales of cotton, amounting to the sum of $1,904 70.

And the court found as a conclusion of law that the government of England accords to citizens of the United States the right to prosecute claims against such government.

By the court.

11 In the Court of Claims.

JAMES O'KEEFFE
vs.
THE UNITED STATES. } No. 2907.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the defendants, by their special counsel, for the allowance of an appeal, as filed in the clerk's office, January 24, 1870, and of the order of the said court, allowing the same, of the findings of fact and conclusions of law thereon, upon which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this fourth day of November, 1870.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 280. Court of Claims. The United States, appellants, v. James O'Keeffe. Filed 4th November, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, APPELLANTS, vs. JAMES O'KEEFFE. } No. 280.

APPEAL FROM THE COURT OF CLAIMS.—BRIEF FOR THE APPELLANTS.

Great Britain does not accord to citizens of the United States the right to prosecute claims against its Government in its courts, as contemplated by act of Congress of July 27, 1868.

In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, APPELLANTS,
vs.
JAMES O'KEEFFE.
No. 280.

Appeal from the Court of Claims.—Brief for the appellants.

This is a case brought here by appeal from the Court of Claims, where the appellee, having, under the act of March 12, 1863, claimed to recover the net proceeds in the Treasury of the United States of certain cotton owned by him, seized by officers of the United States in Savannah, Georgia, and subsequently sold, recovered judgment for the sum of $1,904 70.

The claimant is a subject of Great Britain; and out of this fact arises the question to be determined in this appeal. By the second section of an act approved July 27, 1868, the right of aliens to recover by process in the Court of Claims the proceeds of captured and abandoned property is confined to "citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts."

Whether Great Britain does so accord, is the question upon which the appellants desire the determination of this court.

The facts upon which the Court of Claims bases its "conclusion of law, that the government of England

accords to citizens of the United States the right to prosecute claims against such government," are thus set forth in the findings:

"4. That the government of England accords to its subjects and aliens the right to prosecute claims against it by petition of right given by the common law of England, and regulated by statute 23d and 24th Victoria, July 3, 1860, as to the mode of procedure; in which the petition addressed to the King is, by his fiat indorsed thereon, directed to a court of his kingdom to hear and determine the case. The fiat, except in a very extraordinary case, is granted as a matter of right to any suppliant, subject or alien. The petition is in form addressed to the grace and favor of the King, but in practice is left at the office of the home secretary, and the fiat is then obtained as a matter of official routine."

The facts thus found, the Attorney General will maintain, are not sufficient to support the conclusion of law which is rested upon them.

The court does not find accorded by the government of Great Britain to any person an independent right to sue that government. The mode of proceeding is by petition of right, which petition is addressed to the sovereign, and first deposited at the home office, one of the executive departments of the English government, in order to obtain the indorsement thereon *of the sovereign's permission that the suit may be brought in court.* This permission is not granted as a matter of course, but at royal discretion, which withholds it when royalty deems fit—deems the case extraordinary, the court finds.

A right differing from this altogether is that which was provided by statute of the United States establishing the Court of Claims. The words of that enactment are: "and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein;" and further, by way of conferring an additional privilege under conditions, "also all claims which may be referred to said court by either house of Congress." (Act of February 24, 1855, sec. 1, X Stat. L., 612.)

Let it be supposed, now, that this enactment were

altered by inserting after the words, "said court," these words, namely, "the President in each case consenting thereto," so that the enactment should read: "Said court, *the President in each case consenting thereto*, shall hear and determine all claims founded," &c.

Can there be any doubt that this would be a most substantial alteration of the statute; that the privilege then granted would be different from the right now provided? The right to sue the United States in the Court of Claims, which is now unconditioned, would then be subject to the will of the Executive. No petitioner could obtain hearing in that court until he first obtained the consent to such hearing of the President, the supreme head of the departments, against the action of one of which he wished to obtain a judgment.

The position is further illustrated by reference to the privilege raised by this statute, in addition to the right which has just been under consideration—the privilege of a hearing in the Court of Claims upon any claim "referred to said court by either house of Congress." That this privilege is different from the right previously conferred needs no argument. The one is an absolute right of suit; the other, a privilege to be exercised only with the permission of at least one branch of Congress.

There is another respect, in which the remedy by petition of right is lacking of an essential element of a genuine remedy by process of law.

Upon examination of the fifteenth section of the act of Parliament under consideration, it appears that proceedings in courts upon a petition of right are not regulated by the same freedom of discretion, which is the distinctive mark of true judicial authority. Unlike proceedings between private parties, they are subject to the direct control of the royal authority. The sovereign may, by proclamation inserted in the London Gazette, suspend the rules adopted by the courts to regulate such proceedings, so that the same "shall not be binding and obligatory on the said courts."

The act of July 27, 1868, requires in reciprocity only, as against a foreign government, a juridical remedy—*a*

remedy in court. The enforcement of a judgment is made, neither directly nor indirectly, a criterion of the alien's right to sue in the Court of Claims; but should the point be made, (aside from the main issue,) that the payment of any judgment of the Court of Claims against the United States, depends upon the will of Congress as exercised in an act making an appropriation of money for that purpose out of the National Treasury, it will be seen that payment, in England, of judgments against the sovereign upon petitions of right, is subject to equal, if not greater, restriction. (See sec. XIV of the act of 23d and 24th Victoria, referred to in the findings.) It there appears, that where the petition relates to any public matter, judgment in favor of the petitioner is to be paid out of any money in the hands of the commissioners of the treasury "for the time, being applicable thereto, or which may be hereafter voted by Parliament for that purpose;" that is, out of moneys which have been or may be appropriated by Parliament. In cases of the other class, there is still further condition—another will, besides that of the national legislature, is to be consulted. In any case affecting her Majesty in her private capacity, the payment is to be made (runs the statute) "out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose."

It thus appears, that a judgment of an English court, upon a petition of right in favor of the petitioner, is in no case of more force than a judgment of the Court of Claims in favor of a claimant, while the right to proceed by petition of right, is under a qualification, such as does not attach to the right of suit in the Court of Claims.

In this court of the United States, suit is brought against the Government, as in other courts, State and Federal, against private individuals, as of course, of absolute legal right, without permission from any source.

In the British courts, on the other hand, no suit can be brought by petition of right against the government, except by the express permission of the government, indorsed on the petition by which the suit is commenced.

Under similar circumstances the jurisdiction of the Court of Claims is based upon a *law of the land*. The jurisdiction of an English court depends upon the arbitrary will of a ruler.

The latter right, it is submitted, does not answer the requirements of the statute regulating the right of aliens to sue in the Court of Claims for the recovery of proceeds of captured and abandoned property. The right, in return for which the American right is to be accorded, should be substantially like the American right—should balance it. It is not substantially like the American right, nor does it balance the latter, when it depends for its exercise upon the arbitrary will of the government, no matter what may have been the general custom of the government in the exercise of such arbitrary will—no matter how liberal the actual practice in the past may have been.

The right to prosecute claims against the British government in the British courts is not accorded to any person, citizens of the United States, or others; nothing is so accorded, but the privilege to prosecute such suits when the sovereign of Britain consents thereto.

In Great Britain there is no such right of prosecution, save as existing at common law; and the common law, as well known, recognizes the sovereign as exempt from liability to suit. (Bonner *vs.* The United States, 9 Wall., 156.) On the other hand, in the United States, by departure from the principles of the common law, the nation has made itself liable to be sued as private individuals are sued. Herein the statute of July 27, 1868, calls for reciprocity, and the appellee does not show such reciprocity on the part of his government.

The relief, which may be proper for claimants such as the appellee, is not now intrusted to the Court of Claims; it is, down to this time, reserved within its exclusive authority by the national legislature.

For the convenience of the court, the act of Parliament referred to is printed herewith.

AMOS T. AKERMAN,
Attorney General.

CAP. XXXIV.

AN ACT to amend the law relating to Petitions of Right, to simplify the proceedings, and to make provisions for the costs thereof. [3d July, 1860.]

Whereas it is expedient to amend the law relating to "Petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and course of practice and procedure now in force in actions and suits between subject and subject:"

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. A petition of right may, if the suppliant think fit, be instituted in any one of the superior courts of common law or equity at Westminster, in which the subject-matter of such petition, or any material part thereof would have been cognizable if the same had been a matter of dispute between subject and subject, and if instituted in a court of common law, shall state in the margin the venue for the trial of such petition; and such petition shall be addressed to her Majesty in the form or to the effect in the schedule to this act annexed, [No. 1,] and shall state the Christian and surname, and usual place of abode of the suppliant and of his attorney, if any, by whom the same shall be presented, and shall set forth with convenient certainty, the facts entitling the suppliant to relief, and shall be signed by such suppliant, his counsel or attorney.

II. *The said petition shall be left with the secretary of state for the home department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.*

III. *Upon her Majesty's fiat being obtained to such petition, a copy of such petition and fiat shall be left at the office of the solicitor to the treasury*, with an indorsement thereon in the form or to the effect in the schedule [No. 2] to this act annexed, praying for a plea or answer on behalf of her Majesty within twenty-eight days, and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate, and the same shall be prosecuted in the court in which the same shall be instituted, or in such other court as the lord chancellor may direct.

IV. *The time for answering, pleading, or demurring to such petition, on behalf of her Majesty, shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the solicitor to the treasury*, or such further time as shall be allowed by the court or a judge: *Provided, always*, That it shall be lawful for the lord chancellor, on the application of the attorney gen-

eral or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same.

V. In case any such petition of right shall be presented for the recovery of any real or personal property, or any right in or to the same, which shall have been granted away or disposed of by or on behalf of her Majesty or her predecessors, a copy of such petition, allowance, and fiat shall be served upon or left at the last or usual, or last known place of abode of the person in the possession, occupation, or enjoyment of such property or right, indorsed with a notice in the form set forth in schedule [No. 3] requiring such person to appear thereto within eight days, and to plead or answer thereto in the court in which the same shall be prosecuted within fourteen days after the same shall have been so served or left as aforesaid; and it shall not be necessary to issue any *scire facias* or other process to such person for the purpose of requiring him to appear and plead or answer to such petition, but he shall within the time so limited, if it be intended by him to contest such petition, enter an appearance to the same in the form set forth in schedule [No. 4] to this act annexed, or to the like effect, and shall plead, answer, or demur to the said petition within the time specified in such notice, or such further time as shall be allowed by the court or a judge.

VI. Such petition may be answered by way of answer, plea, or demurrer, in a court of equity or in a court of common law by way of plea or demurrer, or by both pleas and demurrer, by or in the name of her Majesty's attorney general on behalf of her Majesty, and by or on behalf of any other person who may, in pursuance hereof, be called upon to plead or answer thereto, in the same manner as if such petition in a court of equity were a bill filed therein, or if the petition be prosecuted in a court of common law, as if the same were a declaration in a personal action, and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant, and such and the same matter as would be sufficient ground of answer or defense in point of law or fact, to such petition on the behalf of her Majesty may be alleged on behalf of any such other person as aforesaid, called on to plead or answer thereto.

VII. So far as the same may be applicable, and except in so far as may be inconsistent with this act, the laws and the statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity, and personal actions between subject and subject, and the practice and course of practice of the said courts of law and equity respectively, for the time being, in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted, otherwise order, be applicable, and apply and extend to such petition of right: *Provided always*, That nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of act.

VIII. In case of failure on behalf of her Majesty, or any such other person as aforesaid called upon to answer or plead to such petition, to plead, answer, or demur, in due time, either to such petition, or at any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the court or a judge for an order, that the petition

may be taken as confessed; and it shall be lawful for such court or judge, on being satisfied that there has been such failure to plead, answer, or demur, in due time, to order that such petition may be taken as confessed against her Majesty, or such other party so making default; and in case of default on the behalf of her Majesty, and any other person (if any) called upon as aforesaid, to answer or plead thereto, a decree may be made by the court, or leave may be given by the court, on the application of the suppliant, to sign judgment in favor of the suppliant: *Provided always*, That such decree or judgment may afterward be set aside by such court or a judge, in their discretion, on such terms as to them or him shall seem fit.

IX. Upon every such petition of right the decree or judgment of the court, whether given upon demurrer, upon the pleadings, or upon a default to answer or plead in time, or after hearing or verdict, or in error, shall be that the suppliant is or is not entitled either to the whole or some portion of the relief sought by his petition, or such other relief as the court may think right; and such court may give a decree of judgment that the suppliant is entitled to such relief, and upon such terms and conditions (if any) as such court shall think just.

X. In all cases in which the judgment, commonly called a judgment of *amoveas manus*, has heretofore been pronounced or given upon a petition of right, a judgment that the suppliant is entitled to relief as hereinbefore provided, shall be of such and the same effect as such judgment of *amoveas manus*.

XI. Upon any such petition of right the attorney general, or other person appearing on behalf of her Majesty, and every such other person as aforesaid who shall appear and plead, or answer to such petition, shall be entitled, respectively, to recover costs against the suppliant in the same manner, and subject to the same restrictions and discretion, and under the same rules, regulations, and provisions, so far as they are applicable, as are or may be usually adopted or in force touching the payment or receipt of costs in proceedings between subject and subject, and for the recovery of such costs, such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon judgments in personal actions or decrees, rules or orders, shall and may be prosecuted, sued out, and executed, respectively, by or on behalf of her Majesty, and of such other person as aforesaid as shall appear and plead to such petition; and any costs recovered on behalf of her Majesty shall be paid into the exchequer, and shall become a part of the consolidated fund, except where such petition shall be defended on behalf of her Majesty in her private capacity, in which case such costs shall be paid to the treasurer of her Majesty's household, or such other person as her Majesty shall appoint to receive the same.

XII. Upon any such petition of right the suppliant shall be entitled to costs against her Majesty, and also against any other person appearing, or pleading, or answering to any such petition of right, in like manner, and subject to the same rules, regulations, and provisions, restrictions, and discretion, as far as they are applicable, as are or may be usually adopted or in force touching the right to recover costs in proceedings between subject and subject, and for the recovery of any such costs from any such person other than her Majesty, appearing, or

pleading, or answering, in pursuance hereof, to any such petition of right, such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon rules, orders, decrees, or judgments in personal actions between subject and subject, shall and may be prosecuted, sued out, and executed on behalf of such suppliant.

XIII. Whenever, upon any such petition of right, a judgment, order, or decree shall be given or made that the suppliant is entitled to relief, and there shall be no rehearing, appeal, or writ of error, or in case of an appeal or proceedings in error a judgment, order, or decree shall have been affirmed, given, or made that the suppliant is entitled to relief, or upon any rule or order being made entitling the suppliant to costs, and one of the judges of the court in which such petition shall have been prosecuted shall and may, upon application in behalf of the suppliant, after the lapse of fourteen days from the making, giving, or affirming of such judgment or decree, rule, or order, certify to the commissioners of her Majesty's treasury, or to the treasurer of her Majesty's household, as the case may require, the tenor and purport of the same, in the form in the schedule [No. 5] to this act annexed, or to the like effect; and such certificate may be sent to or left at the office of the commissioners of her Majesty's treasury, or of the treasurer of her Majesty's household, as the case may be.

XIV. It shall be lawful for the commissioners of her Majesty's treasury, and they are hereby required, to pay the amount of any moneys and costs as to which a judgment or decree, rule, or order shall be given or made that the suppliant in any such petition of right is entitled, and of which judgment or decree, rule, or order the tenor or purport shall have been so certified to them as aforesaid, *out of any moneys in their hands for the time being applicable thereto, or which may be hereafter voted by Parliament for that purpose*, provided such petition shall relate to any public matter; and in case the same shall relate to any private property of or engaged by her Majesty, or any contract or engagement made by or on behalf of her Majesty, or any matter affecting her Majesty in her private capacity, a certificate in the form aforesaid may be sent to or left at the office of the treasurer of her Majesty's household, or such other person as her Majesty shall from time to time appoint to receive the same, and the amount to which the suppliant is entitled shall be *paid to him out of such funds or moneys as her Majesty shall be graciously pleased to direct to be applied for that purpose.*

XV. It shall be lawful for the judges of the said courts of law and equity, respectively, or any three or more of the judges of the court of chancery, of whom the lord chancellor shall be one, and for any eight or more of the judges of the courts of common law, of whom the chiefs of each of the said courts shall be three, from time to time, to make all such general rules and orders in their said respective courts of law and equity for regulating the pleading and practice on such petitions of right, and for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the several matters herein contained, and the performance thereof, and for the government and conduct of the officers of their respective courts in and relating to the distribution and performance of the duties and business to be done or performed in execution of this act as such judges may

think fit, reasonable, necessary, or proper, and to frame such writs and forms of proceedings as to them may seem expedient for the purposes aforesaid; and all such rules, orders, or regulations shall be laid before both houses of Parliament, if Parliament be then sitting, immediately upon the making of the same, or if Parliament be not sitting, then within five days after the next meeting thereof; and no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both houses of Parliament; and any rule, order, or regulation so made shall, from and after such time aforesaid, be binding and obligatory on the said courts, and on any courts of error or appeal into which any judgments or decrees of the said courts shall be carried by any writ of error or appeal, and be of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament: *Provided always, That it shall be lawful for the Queen's most excellent Majesty, by any proclamation inserted in the London Gazette, or for either of the houses of Parliament, by any resolution passed at any time within three months next after such rules, orders, and regulations shall have been laid before Parliament, to suspend the whole or any part of such rules, orders, or regulations, and in such case the whole, or such part thereof as shall be so suspended, shall not be binding and obligatory on the said courts.*

XVI. In the construction of this act, the words "her Majesty" shall extend to and include her Majesty's successors; and the words "lord high chancellor" and "lord chancellor" respectively, shall mean and include keeper of the great seal and commissioners for executing the office of lord chancellor or keeper of the great seal. The word "court" shall be understood to mean any one of the superior courts of common law or equity, at Westminster, in which any such petition is presented. The word "relief" shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages or otherwise; and the word "judge" shall be understood to mean a judge or baron of any of the said courts respectively; and wherever in this act, in describing or referring to any person, party, or thing, any word importing the singular number, or masculine or feminine gender is used, the same shall be understood to include and be applicable to several persons and parties as well as one person or party, and to females as well as males, and males as well as females, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it otherwise be provided, or there be something in the subject or context repugnant to such construction.

XVII. In citing this act in any instrument, document, or proceeding, it shall be sufficient to use the expression: "The petitions of right act, 1860."

XVIII. Nothing in this act contained shall prevent any suppliant from proceeding as before the passing this act.

Schedule referred to in foregoing act.

No. 1.

PETITION.

In the Queen's Bench [or common pleas, or exchequer of pleas, or in chancery.]

To the Queen's most excellent Majesty:

[MIDDLESEX, *to wit:*] The humble petition of A. B., of ———, by his attorney, E. F., of ———, showeth that [state the facts.]

CONCLUSION.

Your suppliant, therefore, humbly prays that, &c. Dated the ——— day of ———, A. D.

(Signed) A. B.
or C. D., *Counsel for A. B.*
or E. F., *Attorney for A. B.*

No. 2.

The suppliant prays for a plea or answer on behalf of her Majesty within twenty-eight days after the date hereof, or otherwise that the petition may be taken as confessed.

No. 3.

To A B.:

You are hereby required to appear to the within petition, in her Majesty's Court of Queen's Bench, [common pleas, or exchequer, or high court of chancery,] within eight days, and to plead or answer thereto within fourteen days after the date hereof.

Take notice that, if you fail to appear or plead or answer in due time, the said petition may, as against you, be ordered to be taken as confessed.

Dated, &c.

No. 4.

In the Queen's Bench, [or common pleas, or exchequer of pleas, or in chancery.]

Petition of right.

A. B., SUPPLIANT, } C. D. appears in person.
vs. } E. F., attorney for C. D, appears for him.
THE QUEEN.

If the appearance be in person, the address of the party appearing to be given.

Entered the ——— day of ———, 186—.

No. 5.

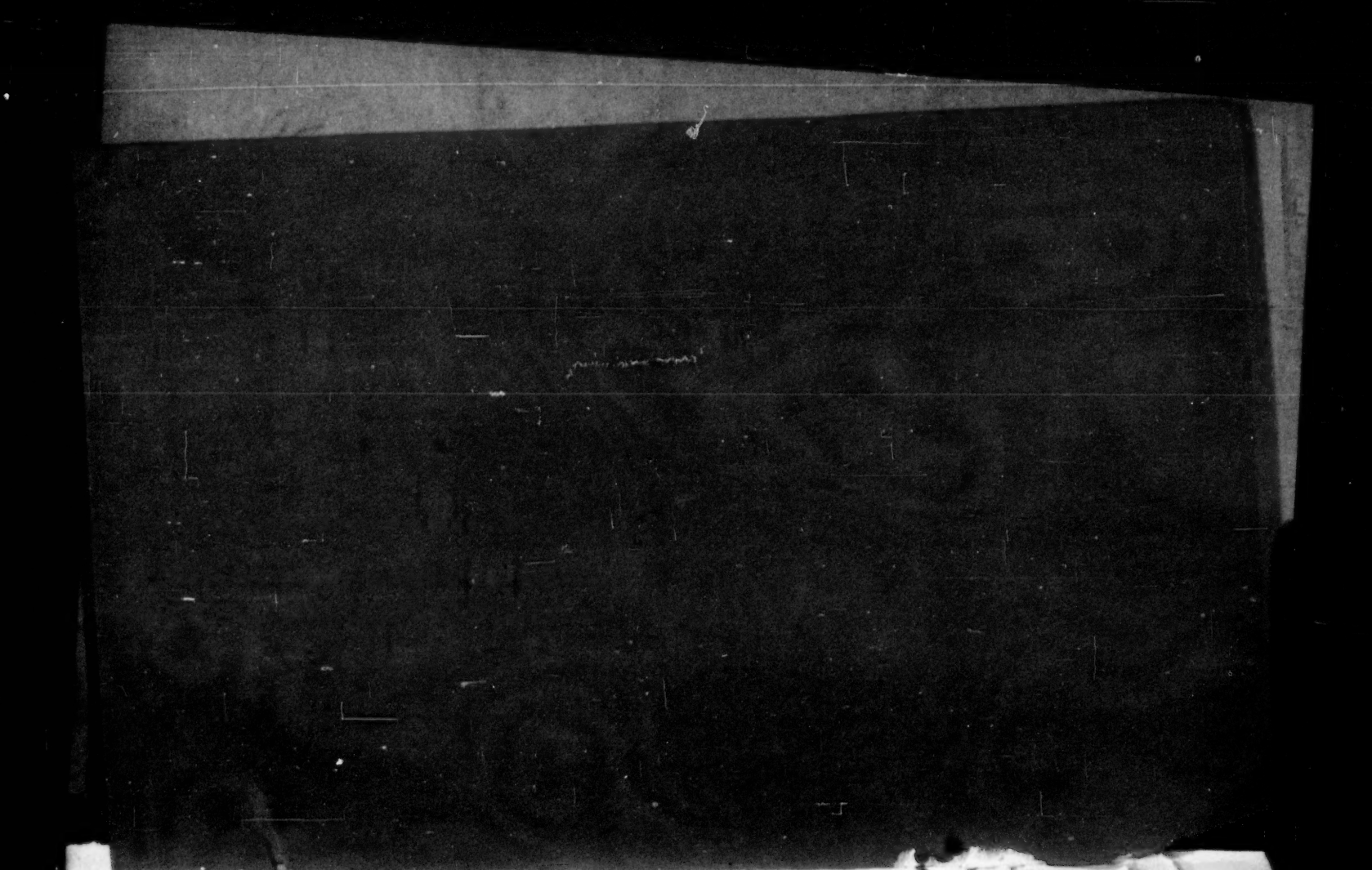
Certificate of a judge of the court of the tenor, and purport of the judgment or decree.

To the commissioners of her Majesty's treasury, [or the treasurer of her Majesty's household:]

Petition of right of A. B. in her Majesty's Court of Queen's Bench, [common pleas, or exchequer, or high court of chancery,] at Westminster.

I humbly certify that, on the ——— day of ———, A. D. ———, it was by the said Court of Queen's Bench, [common pleas, or exchequer, or high court of chancery,] adjudged [or decreed or ordered] that the above-named suppliant was entitled to, &c.

[*Judge's signature.*]



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Supreme Court of the United States.

DECEMBER TERM, A. D. 1870.

———:-o-:———

THE UNITED STATES, Appellants,

vs.

JAMES O'KEEFE, Appellee,

No. 280.

———:-o-:———

RBIEF FOR APPELLEE.

COOLEY & CLARKE,
JOHN J. WEED,
Counsel for Appellee.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1870.

———:-o-:———

THE UNITED STATES, APPELLANTS,

vs.

JAMES O'KEEFE, APPELLEE.

No. 280.

———:-o-:———

Brief for the Appellee.

I.

This action was brought in the Court of Claims, under the act of March 12, 1863, known as the "captured and abandoned property act," by the claimant and appellee, (who is a subject of Great Britain, but who, during the rebellion, was domiciled in the city of Savannah, Ga.,) to recover the net proceeds of certain cotton, of which he was the owner, and which was taken from his possession by the federal military authorities, after the capture of that city, in December, 1864. The Court of Claims rendered judgment in favor of the appellee, for the sum of $1,904 70, from which judgment the defendant appeals to this court.

The findings of fact and conclusions of law as certified by the court below, are as follows:

1. That the claimant is an English subject, and in January, 1865, resided in the city of Savannah, in the State of Georgia, and owned and had in his possession eighteen bales of upland cotton, stored in a house numbered 148 Broughton street.

2. That the United States took possession of said cotton, by placing a military guard over it, in the house in which it was stored. That subsequently a fire broke out in the cellar in which this and other cotton was stored. That the cotton in the cellar was got out of it, some burned, some wet, some in broken bales, and some in whole bales, and some loose; that it was carried away by the United States and repacked and sold, and the net proceeds thereof paid into the Treasury.

3. That ten bales of said cotton belonged to the claimant.

4. *That the government of England accords to its subjects and aliens the right to prosecute claims against it by petition of right given by the common law of England, and regulated by statute 23d and 24th Victoria, July* 3, 1860, *as to the mode of procedure;* in which the petition addressed to the King is by his fiat indorsed thereon, directed to a court of his kingdom to hear and determine the case. The fiat, except in a very extraordinary case, is granted as a matter of right to any suppliant, subject, or alien. The petition is in form addressed to the grace and favor of the King, but in practice is left at the office of the Home Secretary, and the fiat is then obtained as a matter of official routine.

5. That the petitioner had not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the Government.

6. And the court hold that the claimant is entitled to judgment against the United States for the net proceeds of said ten bales of cotton, amounting to the sum of $1,904 70.

And the court found as a conclusion of law, that the government of England accords to citizens of the United States the right to prosecute claims against such government. Record, 4, 5.

II.

The question involved here is one of *fact*, and the finding of the Court of Claims upon that question of *fact*, becomes material in view of the provisions of the act of Congress approved July 27, 1868, in which, amongst

other things, it was provided in the second section, as follows:

That no action or suit shall be maintained in any court of the United States, or of any State thereof, in the name or in the behalf or interest of any *alien* against the United States, or any person for or on account of any act done or omitted to be done by such person, as an officer or agent of the United States, in the administration of the act of Congress, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' approved March 12, 1863: *Provided, that this section shall not be construed so as to deprive aliens who are citizens or subjects of any government, which accords to citizens of the United States, the right to prosecute claims against such government in its courts, of the privilege of prosecuting claims against the United States in the Court of Claims as now provided by law.*

15th Stat. at Large, p. 243.

In the Court of Claims, therefore, the inquiry was: Does the government of Great Britain ACCORD to citizens of the United States the right to prosecute claims against such government in its courts? This question was answered by the Court of Claims in the affirmative, and that court find as a *fact* the existence of this right.

A preliminary objection may with propriety be considered here. This objection suggests itself as pertinent under the rules regulating appeals from the Court of Claims. The first of those rules requires the Court of Claims to certify to this court its finding of facts and conclusions of law, separately. These findings of *fact* are in the nature of a special verdict, and are not subject to review here. But, this court, by this appeal, is requested to review the findings of the Court of Claims, *upon a question of fact*. It is objected, therefore, that it is not competent for this court to review the finding of the Court of Claims, in regard to the existence of the right of citizens of the United States *to prosecute claims against the government of Great Britain in its courts*. The existence

of this right was a *fact*, which the Court of Claims found from the evidence submitted to it for the purpose of proving that *fact;* and the fact certified here by the Court of Claims was the ultimate fact, established by the evidence adduced for that purpose. It is nothing to the purpose of this inquiry to consider by what particular evidence the Court of Claims reach the conclusion, that the right contended for did in fact exist, and was secured to the full extent required by the provisions of the act of Congress, above quoted. If the evidence from which the Court of Claims reaches its ultimate finding in regard to the *fact* required by this act of Congress to be established, had been set out in the record, and certified here *in extenso*, this court would have remanded this record to the Court of Claims for a special and certain finding in regard to the *facts*, upon the existence of which the right of the claimant to maintain his action in the Court of Claims depended. This court held in the *United States* vs. *Adams*, (6 Wallace, 101,) that it would not require the Court of Claims to certify the evidence from which the *ultimate fact* proved was deduced, and in that connection the court use the following language:

> To do so, (that is re-examine the evidence upon which the Court of Claims certified ultimate facts,) would require an examination of evidence and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences from the whole, which is the peculiar province of a jury, and which by our rule, we intended to exclude from the consideration of this court, *by making such finding by the Court of Claims conclusive.*
>
> 6 Wallace R., 112.
>
> *Burr* vs. *Des Moines Nav. Co.*, 1 Wallace R., 102.

It is to be determined, therefore, whether the existence of the right of citizens of the United States to prosecute claims against the government of Great Britain in its courts is a question of *fact*, because if the existence of this

right is conceded to be but a question of *fact*, the finding of the Court of Claims, in respect thereto must be held as conclusive upon this court.

The Court of Claims finds as a *fact:*

"That the government of England *accords* to its subjects and *aliens*, the right to prosecute claims against it by petition of right given *by the common law of England*, and *regulated* by statute 23d and 24th Victoria, July 3, 1860, as to the *mode* of procedure."

It is well settled that what the foreign law of a country may be, is exclusively a question of fact. Lord Mansfield, in the case of *Mostyn* vs. *Fabrigas*, (Cowp. Rep., 174,) said: "The way of knowing *foreign laws* is by admitting them to be proved as *facts*. In strict harmony with this proposition are the following authorities, wherein it is specially declared that foreign law must be proved as a fact:

Smith vs. *Bartram*, 11 Ohio, (N. S.,) 690.
Beach vs. *Workman*, 20 N. H., 379.
Church vs. *Hubbard*, 2 Cranch, 187.
Hempstead vs. *Reed*, 6 Conn., 480.
Thrasher vs. *Everhart*, 3 Gill & Johns, 234.
Peckard vs. *Bailey*, 6 Foster, (N. H.,) 152.
Bryant vs. *Kelton*, 1 Texas, 434.
Tyler vs. *Trubru*, 8 B. Mon., 306.
Adams vs. *Gay*, 19 Vt. (4 Washb.,) 358.

If we are correct in assuming, therefore, that the existence of this right is to be established by evidence adduced for that purpose, as any other fact required to be found by the Court of Claims, in this cause was established, then we insist that the finding of the Court of Claims in regard to that question of fact is *conclusive*, and cannot be reviewed by this court.

III.

The proposition which the Attorney General asserts and seeks to maintain is as follows: "*Great Britain does not accord to citizens of the United States the right to prosecute*

claims against its government in its courts, as contemplated by act of Congress of July 27, 1868."

The argument from which the Attorney General assumes that this conclusion is reached, is furnished from the "*Petitions of Right Act*," passed July 3d, 1860, which amends and prescribes the *mode* of procedure under petitions of right. It is assumed by the Attorney General that his proposition finds support in the *second* section of said act, wherein it is provided as follows:

The said petition shall be left with the secretary of state for the home department, in order that the same may be submitted to her Majesty for her Majesty's gracious consideration, and in order that her Majesty, if she shall think fit, may grant her fiat that right be done, and no fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

If the petition of right had its origin with the passage of this act and existed only in virtue of it, then it might perhaps be urged that, but a *conditional* right to sue the government of Great Britain had been given. But the petition of right is older than this statute, and does not depend upon any statute for its existence or authority; and even if this statute were the source from which the petition of right derived its origin, the right to institute the petition is clearly given by the *first* section of the act, in which it is provided as follows:

A petition of right may, if the suppliant think fit, be instituted in any one of the superior courts of common law or equity at Westminster, in which the subject-matter of such petition, or any material part thereof, would have been cognizable if the same had been a matter of dispute between subject and subject.

The proposition asserted by the Attorney General seems to require an examination of the question as to whether the proceeding by petition of right ~~is~~, in its practical effect, a suit or proceeding against the crown, whether it is a right *accorded* within the meaning of the act of July 27, 1868.

Blackstone, speaking of the usual mode of proceeding by which real or personal property is recovered from the crown, says:

The common law methods of obtaining possession or restitution from the crown of either real or personal property are, 1. By *petition de droit*, or petition of right * * * 2. By *monstrans de droit*, manifestation, or plea of right; both of which may be preferred or prosecuted either in the chancery or the exchequer.

The former is of use where the king is in full possession of any hereditaments or rights, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself, in which he must be careful to state truly the whole title of the crown, otherwise the petition shall abate; and then upon this answer being indorsed or underwritten by the king, *soit droit fait al partie*, (let right be done to the party,) a commission shall issue to inquire the truth of this suggestion, after the return of which the king's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suit between subject and subject. 3 Com., 356.

The *extent* to which the petition of right is accorded, and the purposes for which it may be instituted, are indicated in the following authorities:

Feather vs. *The Queen*, 6 Best & Smith, 257.

Tobin vs. *The Queen*, 16 C. B. N. S., 310.

In these cases it is held that the petition of right is "open to the party when lands or goods or money of a party have found their way into the possession of the crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money; or when the claim arises out of a contract, as for goods supplied to the crown, or for the public service."

Again, Blackstone says, 3 vol., 255, whenever it happens that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign,

(for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute; and as it presumes that to *know* of any injury, and to *redress* it, are inseparable in the royal breast, *it then issues as of course*, in the king's own name, his orders to his judges to do justice to the party aggrieved. Manning's Exch. Prac., 84–5.

The language of the act of July 27, 1868, requires that the right to prosecute claims against a foreign government should be *a right accorded to prosecute claims in court;* and if the petition of right accords or confers that right, it is sufficient to meet the requirements of the statute, and the objections of the Attorney General. In England, claims against the Government were claims against the king, and in the earliest history of that country could be prosecuted only to the king in person, because the claims or disputes between subject and subject could only be presented in that way. In after years where claims were presented to the king, for which payment had been refused by the various accounting or executive officers of the crown, it became his custom to refer the matter to one of his courts for examination and adjudication.

The king being the fountain of all justice, and willing to do what the law demanded, as he required all his subjects to do, needed but to be advised what was lawful and what unlawful, that he might do the one and shun the other, for the King is as much bound by the law as any of his subjects (1 Bl. Comm., 234.)

It was for the purpose of being so advised, and to the end that exact justice might be done, that the king remitted these claimants to the various courts when their claims were presented to him for payment.

The first remission of particular claimants thus made by the king, was made in the time of Edward I, and it

was in the reign of this king that the *petition de droit* became acknowledged and established. This petition was always instituted in or remitted to some court. Blackstone says it might "be preferred either in the Chancery or the Exchequer;" and by the petition of rights act of 1860, the right to institute the petition "in any of the superior courts of common law or equity at Westminster," was granted. But the right to institute the petition, did not confine the right to bring the petition to the courts named in the act of 1860, for section XVIII expressly provides that nothing therein contained "shall prevent any suppliant from proceeding as before the passage of this act."

But the objection is, that although the proceeding by petition of right is a proceeding or suit in court, yet the proceeding is of no value, as a judicial proceeding until the *fiat* or permission of the crown is first obtained to such petition. The Court of Claims finds that the *fiat*, "except in very extraordinary cases, is granted *as a matter of right*." The granting of the *fiat* is only a matter of official routine, and is in the nature of suing out or issuing process in suits between subject and subject. No suit can be commenced against a subject without a *writ*, which is in form a command of the king directing something to be done; and the same form is preserved in this country. It is the writ that gives jurisdiction to the court; for without a writ, and the service of a writ, no court has jurisdiction either in this country or in England.

In England the writ is in the name of the Queen; in this country, in the Federal courts, in the name of the President.

Respecting writs, Blackstone says: "First then of the "*original*, or original writ, which is the beginning or foundation of the suit * * * It is a mandatory letter from the King, sealed with the great seal, and directed to the sheriff of the county wherein the inquiry is committed,

or supposed to be, requiring him to command the wrong doer or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him." 3 Com., 272.

But, says Tidd, "no writ can issue against the king because he could not command himself, and therefore the plaintiff must proceed by petition." (Practice, p. 1075.) It is obvious that the fiat "*soit droit fait*" in the proceeding by petition is precisely equivalent to the "*præcipe quod reddat*" or other writ in common law cases.

That the right to withhold the fiat or the writ may, under possible contingencies, be exercised, is nothing to the purpose. Certainly a State has a right to sue in the Supreme Court of the United States, and yet no State can file a bill therein, without actual leave first obtained on motion after submitting a copy of the bill proposed to be filed. It is possible the court might refuse leave, but that possibility does not destroy the right. So, all process is executed by officers under the theoretical direction of the President. He might refuse to allow the marshal, his officer, to execute process and so the jurisdiction of the court would fail. Indeed, such a case has occurred. But because in any particular case the law may not be executed, it does not follow that parties have no rights under the law. Such is merely a case where the private right yields to public exigencies; it does not prove that the right does not exist.

In conclusion, therefore, it is submitted:

1st. That the right of citizens of the United States to prosecute their claims against the Government of Great Britain, in its courts, being a question of *fact*, and such *fact* being found by the Court of Claims in favor of the existence of that right, is conclusive upon this court, and not subject to review or revision by this court.

2d. That the proceeding by petition of right is a judi-

cial proceeding, under the common law of England, and the right to bring or maintain such petition is not abridged or taken away by any of the provisions of "the petitions of right act," passed July 3d, 1860.

3d. That the *fiat* of the crown, upon the filing of such petition is granted as a matter of right, and is issued as of course, and is never withheld, except in a very extraordinary case.

4th. That the petition of right is, in England, accorded to *aliens*, as well as subjects.

COOLEY & CLARKE, and
JOHN J. WEED,
Attorneys for Appellee.

Appendix.

Containing so much of the opinion of Loring, J., in the case of James O'Keeffe *vs.* The United States, as discusses the rights of subjects and *aliens* to bring suit against the Government of Great Britain by petition of right.

It was objected for the defendants that the petitioner was an alien and a British subject, and as such had no status in this court under the second section of the act of July 27, 1868. And in reply to this the petitioner claimed that the evidence adduced by him brought him within the proviso of the section by proving that the British government accorded to American citizens as well as to its own subjects the right to prosecute claims against it in its courts by the petition of right given by the common law, and regulated as to the mode of procedure by the staute of 23d and 24th Victoria, 1860.

The common law was proved by Edwin James, esq., formerly a barrister in England, and Queen's counsel. But it was objected that the statute was not legally proved. We think it was brought within the rule laid down by the Supreme Court. In the case of *Ennis* vs. *Smith*, (14 How., 400,) cited by the counsel for the petitioner, the court, after citing and commenting upon the cases on the point, said as follows: "Notwithstanding the differences in the cases cited we think that the true rule in respect to the admissibility of foreign law in evidence may be gathered from them. In our view it is this, that a foreign law may be received when it is found in a statute book, with proof that the book has been officially published by the government which made the law. Such is the foundation of Lord Tenterden's rule in *Lacon* v. *Higgins*. 3 Starkie's reports, 178." Now the evidence in that case was as follows: "The vice-consul of France called as a witness, produced a book which he said contained the French code of laws upon which he acted in his office. He stated that there was in Paris an office for the printing of the laws of France, called the royal printing office, where the laws were printed by the authority of the French government. The book itself, which not only contained a body of French laws, but also a commentary upon them by Mr. Liree, purported to have been printed at that office and to contain a copy of the constitutional charter of France.

The witness also stated that the book would have been acted on in any of the French courts."

In the case before us the witness, Mr. James, produced a volume of the English statutes purporting on its title page to be the statutes of England, printed by the printers to the Queen, and he testified thus: "I produce a copy of the statute printed by the Queen's printers, in England, which is made evidence in all the English courts, and it so happens that of my own knowledge I know such a statute was passed, for I was in the House of Commons at the time as a member, and took a part in the debate at the time. The statute was passed and received the royal assent on the 3d of July, 1860, and is entitled 'An act to amend the law relating to petitions of right, to simplify the proceedings, and to make provisions for the costs thereof;' and is to be found on pages 207 and 214, inclusive, of the Statutes passed in the 23d and 24th years of the reign of Queen Victoria, printed by the Queen's printers, and I can identify the volume exhibited as an authorized copy of the statutes so far as the law of England is concerned.

This testimony brings this case within the rule laid down by the Supreme Court, and within the authority of the case ruled by Lord Tenterden, and cited and approved by the Supreme Court.

It was objected that the allowance of the petition of right in England "was a matter of grace and favor only of the sovereign, to allow himself to be brought into court, and not a matter of right or *ex debito justitia*."

This is true and necessarily true, for neither in England nor in this country can the sovereign be subjected to suit, except by his own consent and according to it. Justice Story, in his Commentaries on the Constitution, when commenting on the clause "which extends the judicial power to controversies to which the United States shall be a party," (§ 1675,) says as follows: "It it is observable that the language used does not confer upon any court cognizance of all controversies to which the United States shall be a party, so as to justify a suit to be brought against the United States without the consent of Congress, and the language was doubtless thus guardedly introduced for the purpose of avoiding any such conclusion. It is a known maxim, justified by the general sense and practice of mankind and recognized in the law of nations, that it

is inherent in the nature of sovereignty not to be amenable to the suit of any private person without its own consent. This exemption is an attribute of sovereignty, belonging to it in every State in this Union, and was designedly retained by the national government."

This is the familiar commentary on our own Constitution, which is a form of government ordained and established by the people collectively or as a sovereign, for the people individually or as subjects; and the discretionary power it gives to Congress by which this court was established for suits against the sovereign is but this fiat, "Let right be done." And in theory and in fact, and as a corollary of the maxim of jurisprudence cited by Justice Story, that it is inherent in sovereignty not to be amenable to the suit of a private person without its own consent, every suit on our docket is there by this grant and fiat of the sovereign; and this the Supreme Court declared in the case of De Groot, appealed to it from this court, when speaking in reference to suits here they said, "the government of the United States cannot be sued for a claim or demand against it without its consent."

Here this assent is declared by the Constitution which is only the declaration of the sovereign's will; and which authorized Congress and imposed it on it, as a duty, subject to its legislative discretion, as to time and mode, to provide for the trial of suits against the United States. In England the assent of the sovereign is declared by his fiat indorsed on the petition. But how the assent of the sovereign is declared cannot be material, for declared in either way it is precisely the same thing, the assent of the sovereign to be brought into court.

And certainly our legislation is cognizant of the maxims of jurisprudence and the attributes inherent in sovereignty here and elsewhere; and I think this is shown in the language of the proviso in question here, which is, "any government which *accords* to citizens of the United States the right to prosecute claims against such government in its courts." And to *accord* is to grant *ex gratia*, and not to admit as a right.

And as to the petition of right in England the text books show that its allowance by the sovereign on probable cause shown is held to be a duty in him, and so far a right of the subject. Mr. Manning, in his treatise on the Practice of the Court in Exchequer, page 84, says, as the

prayer is granted *ex debito justitia*, it is called a petiton of right, and that it seems to be within Magna Charter, "*Nulli vendemas, nulli negabimus, aut differemus justitiam, vel rectum.*" And Justice Story says, speaking of the common law right: "In England, if any person has in point of property a just demand upon the King, he may petition him in his Court of Chancery by what is called a petition of right, when the chancellor will administer right, theoretically as a matter of grace and not upon compulsion, but in fact as a matter of *constitutional duty.*" And the text books and the evidence show that in practice, on the presentation of the petition, the fiat issues as a matter of course and official routine. Blackstone, (vol. 3, p. 255,) says that "as it (the law) presumes that to *know* of any injury and to redress it are inseparable in the royal breast, it then issues *as of course* in the King's own name his orders to his judges to do justice to the party aggrieved." And Mr. James says, "The petition in point of fact is left with the Secretary of the Home Department, * * * and the fiat is then obtained as a mere matter of *official routine.*"

Mr. James also said, "There might arise some case, either from political considerations or otherwise, in which the fiat might be withheld, but I can hardly imagine the existence of such a case." And if such a case should occur it would be an exercise of the same power that is used in the act of July 27, 1868, which distinguishes between aliens and subjects, and between aliens, for of these it admits some to this court while it excludes others. If the assent of the sovereign is necessary to a suit against him he may of course dissent.

And the objection seems to have been made in misapprehension of the purpose and effect of the fiat of sovereign, which was to create and enforce a jurisdiction and not merely to express his personal pleasure in the matter, for that was referable to his "constitutional duty," and his coronation oath "to accord unto all men sure and righteous justice." In the earliest and simplest times the sovereign administered justice, and afterward his universal jurisdiction was parcelled out in different courts as they came to be instituted, each with its limited and special jurisdiction. But there remained cases falling within none of these jurisdictions, and among them cases against the sovereign as well as cases against private persons. And

for those not within the jurisdiction of any of the courts, whether they were cases against the sovereign or against private individuals, the only remedy was by petition of right to the sovereign, of whom the theory was, in the words of a English writer on the subject, "all the justice of the realm is hers alone, and she has the first and chiefest place upon the seat it is to be administered, and thereunto by the power of her oath is holden bound." And the fiat of the sovereign, "Let right be done to the party," indorsed on the petition and directed to the court which was to hear and determine the case, made that duty imperative on that court, whatever its special jurisdiction might be, and whatever the subject or nature of the claim might be; so that the want of jurisdiction could not be objected by the court or by anybody else, nor could the suit be barred or delayed by defenses available elsewhere, such as the death of the sovereign, (in former times,) the statute of limitations, &c. Thus the fiat of the sovereign created a jurisdiction where there would have been none otherwise, and prevented a failure of justice.

On the whole case, we think it is proved that the government of England accords to American citizens the right to prosecute claims against it in its courts by the petition of right, and we see no reason to doubt that the remedy is as practical as any against the government here or anywhere else.